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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 710

IN THE MATTER OF GEORGE D. TEMPLETON ON BEHALF OF GEORGE D. TEMPLETON, JR., FOR A WRIT OF HABEAS CORPUS.

APPEAL BY PETITIONER FROM A DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA DENYING THE WRIT.

STATEMENT AS TO JURISDICTION.

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (United States Code, Title 28, Section 344) provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237 (a). A final judgment or decree in any suit in the highest court of a State in which a decision in the

suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54, provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal.
>
> Sec. 2. "* * * That the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

The Act of April 26, 1928, Chapter 440, 45 Stat. 466, provides:

> "Sec. 2. The statutes regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

The decision sought to be reviewed was rendered by the Supreme Court of the State of California on the 14th day of August 1941. It is a memorandum decision appearing in the Minutes of said Court for said date (R. —).

The decision presumably is based on the doctrine and underlying reasons established by the same court in the

cases of *Peo.* v. *Troche,* 206 Cal. 35, and *Peo.* v. *Leong Fook,* 206 Cal. 64.

The application for appeal was presented on the 11th day of September, 1941.

C.

Nature of the Case and Rulings Below.

George D. Templeton, Jr., on whose behalf these proceedings were instituted, on or about the 8th day of August, 1932, by an information filed in the Superior Court of the County of Santa Clara, State of California, was accused of murder in language as follows:

> "the said defendant did wilfully, unlawfully, feloniously, and with premeditation and malice aforethought, kill and murder one Lilian Babcock, a human being."

On August 15, 1932 he was arraigned under said information and objected to pleading thereto on the ground, among others, that

> "the procedure imposed on the accused under sections 1016, 1020, 1026, and 1026a of the Penal Code, is in violation of Section 7 (which confers a right to a trial by an impartial jury) and section 13 (the due process of law clause) of art. 1 of the State Constitution, and also is a violation of the VI and XIV Amendments of the Federal Constitution."

Petitioner's objection was overruled and the ruling excepted to and he was required to plead; he thereupon entered the pleas of "Not Guilty" and "Not Guilty by reason of Insanity."

The arraignment proceedings appear in Appendix A herein.

On September 26th, 1932, petitioner's trial before the Superior Court of the County of Santa Clara was begun

before a jury duly impanelled and sworn on the issue of "Not Guilty".

During the trial of said issue petitioner offered evidence to prove his insanity at the time of the commission of the acts for which he stood charged; said evidence was excluded. Petitioner thereupon entered an exception and objection to the proceedings and to the exclusion of his offer of evidence which appears in detail at pages 4-5-6 of the accompanying record but the last paragraph of which is as follows:

> "If Section 1026 raises a CONCLUSIVE presumption that defendant is sane, within the meaning of section 21, it is usurpation of judicial powers, and a violation of Section 13 of Article 1 of the Constitution of the State of California, and a violation of the due process of law protected by the Federal Constitution in the VI and XIV Amendments of that Constitution."

THE CONSTITUTIONAL QUESTIONS INVOLVED.

We refer to the argument under the head of "Points and Authorities in Support of the Petition for a Writ of Habeas Corpus" comprising pages 15-47 inclusive of the record but since a literal compliance with Rule 12(1) might require an outline of the questions there argued at length, to be included in this statement, we, at the risk of sacrificing brevity, will state the questions involved as briefly and concisely as possible.

Sections 1016, 1020 and 1026 of the Penal Code of the State of California are Unconstitutional.

Sections 1016, 1020 and 1026 of the Penal Code are clearly unconstitutional for the reasons (a) that they prescribe a procedure that denies to petitioner a fair trial by an impartial jury; (b) that they deny to petitioner a trial by due

process of law; (c) that they deny to petitioner the equal protection of the law.

Section 187 of the Penal Code of California defines murder as follows:

> "Murder is the unlawful killing of a human being, with malice aforethought."

The malice required is defined in Section 188, as follows:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

First degree murder, *inter alia*, is a wilful, deliberate, and premeditated killing. (Sec. 189 P. C.)

The information in the case at bar, charges that

> "the said defendant did wilfully, unlawfully, feloniously, and with premeditation and malice aforethought, kill and murder one Lillian Babcock, a human being."

To constitute the crime of murder in the first degree excluding the homicide perpetrated during the commission of certain felonies, these essential ingredients must EXIST AND BE PROVEN:

(a) Express malice, i. e., "a DELIBERATE INTENTION UNLAWFULLY" to take life; or

(b) Implied malice, i. e., "When no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart"; (a mental condition).

(c) A wilful killing;

(d) A deliberate killing; and

(e) A premeditated killing.

The Supreme Court of the State of California decided in the *Troche* case (206 Cal. 35), and the *Leong Fook* case (206 Cal. 64), that the Amendments to Sections 1016, 1020 and 1026 of the Penal Code were merely procedural changes and changed no substantive law nor right.

We therefore start with the unqualified statement by the California Supreme Court that Section 20, Penal Code, reading:

> "In every crime or public offense there must exist a union, or joint operation of act and INTENT, or criminal negligence."

and Section 21, reading:

> "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity."

have not been repealed.

These two Sections enunciate SUBSTANTIVE law, NOT procedural law.

They enunciate this rule of substantive law that in

> "every crime there must exist a union, or joint operation of act and *intent.*" (Sec. 20).

This intent is manifested

> "by the circumstances connected with the offense, AND THE SOUND MIND AND DISCRETION of the accused." (Sec. 21).

In other words, the intent is NOT to be manifested ONLY by

> "the circumstances connected with the offense"

but also by

> "the SOUND mind and DISCRETION of the accused."
> "It is the animus with which an act is done which constituted its criminality."
>
> (*People* v. *Walsh*, 63 Cal. 167).

It, equally, is the animus with which an act is done which determines or should determine what degree of homicide has been committed and what the punishment should be if found to be murder of the first degree.

But the California system of bifurcated trial absolutely precludes the defendant from proving the "animus"—the mental condition—the motive or mentality that would disprove the existence of an "abandoned and malignant heart."

The essential ingredients of the crime of FIRST DEGREE MURDER ARE

1. Malice, express or implied, (Sec. 187-188 P. C.)
2. Wilfullness
3. Deliberation } Sec. 189 P. C.
4. Premeditation
5. A union of Act and intent (Sec. 20 P. C.)
6. The intent to be manifested by the "circumstances connected with the offense, AND THE SOUND MIND AND DISCRETION of the accused." (Sec. 21 P. C.)

All of these essential ingredients must be proven by the prosecution BEYOND A REASONABLE DOUBT.

A person "affected with insanity" is not of sound mind. (Sec. 21 P. C. P.)

> "From time immemorial the real question has always been whether the person accused of crime was capable of criminal intent. The aim of the law has always been to exempt from punishment as criminals those who, from the state of knowledge then existing,

were incapable of criminal intent. Criminal intent is an essential element of crime. If a person is mentally unable to form such intent he cannot be regarded as guilty under the law" (p. 283).

INSANITY AND LAW, by Singer & Krohn

Citing:

Youtsey v. *U. S.*, 97 Fed. 937;
U. S. v. *Lancaster*, 26 Fed. Cas. No. 15,555;
Marler v. *State*, 67 Ala. 55;
Com. v. *Hathaway*, 13 Mass. 299.

"Since a crime includes both the act and the intent, and an unsound mind cannot form criminal intent, insanity is a complete answer to a criminal charge."

INSANITY AND LAW, by Singer & Krohn, p. 284

Citing:

Braswell v. *State*, 1 Ky. Law Rep. 285.

Judge Preston's language in his dissenting opinion in *People* v. *Troche*, 206 Cal. 35, at 53, is unanswerable:

"The plea of not guilty necessarily includes within it the element of insanity. This is true not because of any legislative fiat, but because sanity is a fundamental element of all amenableness to punishment and is the prime ingredient of the criminal legislation of all civilized countries. (See Pen. Code, Secs. 20, 21, 26.) There can be no malice, deliberation or premeditation without sanity. There can be no criminal intent —indeed, no criminal act—where there is no sanity. If the jury, in ascertaining the intent of the defendant, may not consider the evidence of his insanity, it must follow that the Legislature has the power to dispose entirely with the element of intent. Yes, more is true; if the jury may not, before assessing guilt to the defendant, consider the fact that he is insane, not only may criminal intent be dispensed with, but the time-

honored and almost sacred presumption of innocence may be set at naught by the law-making power. (See State *v.* Strasburg, 60 Wash. 106 (Ann. Cas. 1912 B, 917, 32 L.R.A. (N.S.) 1216, 110 Pac. 1020)."

People v. *Troche,* 206 Cal. 35, at 53 (Dissenting Opinion).

In the *Strasburg* case, a very carefully reasoned one, the Court said:

"At the outset, then, let us recur to some fundamental principles touching the effect of the insanity of one accused of crime, at the time of committing the act charged against him, upon the question of his guilt. It is possible we may thus discover that the mental responsibility of the accused is a fact entering into the question of his guilt, upon which he has a right of trial by jury, the same as upon any other fact inherent in that question, even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him. In the text of 4 Blackstone's Commentaries, pp. 20, 21, 24, it is stated: 'All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. * * * The second cause of a deficiency in will, which excuses from the guilt of crime, arises also from a defective or vitiated understanding, viz., in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is that *furiosus furore solo punitur.* In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself.' In 1 Russell on Crimes,

p. 2, it is said: 'Without the consent of the will, human actions cannot be considered as culpable; nor where there is no will to commit an offense is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offenses.' The doctrine as understood in the United States is stated in 16 Am. & Eng. Enc. Law, 2d ed., p. 618, as follows: 'From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent.' This is in accord with the view of our leading American text writers. 1 Wharton, Crim. Law, 10th ed. Sec. 33; 1 Bishop, New Crim. Law, Sec. 375; 1 McClain, Crim. Law, Sec. 154. Mr. Tiedeman in his work on State and Federal Control of Persons and Property (Sec. 47) says: 'It is probably the rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is that there must be a criminal intent in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong. Insanity, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to an acquittal.' In the case of Com. *v.* Rogers, 7 Met. 500, 41 Am. Dec. 458, Chief Justice Shaw, speaking for the Supreme Judicial Court of Massachusetts, said: 'In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.' Mr. Freeman, the able editor of the American Decisions, in his note to State *v.* Marler, 36 Am. Dec. 402, says: 'It was always a settled rule of the common law that a person could not be legally

> punished for any act committed by him while he was insane. * * * The common law never intended to inflict punishment upon one whom it believed to be insane at the time when he did the act charged as a crime; for the law holds that a criminal intent is an essential element in every crime, and if, by reason of insanity, a person be incapable of forming any intent, he cannot be regarded by the law as guilty' " (pp. 1217-1218).
>
> *State* v. *Strasburg*, 60 Wash. 106, 119 Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216, 110 Pac. 1020, 1024).

The California Supreme Court attempts to combat these arguments by saying, first, that the sound mind necessary is proven by the presumption of sanity that attaches to all men, until overcome by evidence (*i. e.*, by a preponderance of evidence) and secondly, that the accused is *not* precluded from proving his insanity as he is entitled to do that under his plea of "not guilty by reason of insanity".

The complete fallacy of the contention does not appear at once and particularly when academically argued. Just how monstrous it is only becomes apparent when encountered in the particular case.

Section 1105 of the Penal Code provides as follows:

> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstance of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

First degree murder is punishable by death or life imprisonment as may be determined by the jury, or, from the evidence, they may find that the accused was not possessed of "an abandoned or malignant heart," which is a mental condition, and determine the homicide to be a second degree murder. But the California Supreme Court has held that

the amended sections complained of provide that evidence in mitigation of the offense; evidence that should be considered by the jury in order that it exercise its discretion so as to fix the punishment in the event of the homicide being declared first degree murder, may *not* be received IF IT TOUCHES ON MENTAL CONDITION.

Because, if the plea be "not guilty" only, then no evidence of insanity may be introduced; the accused is "conclusively" presumed sane. The testimony concerning the "circumstances of the offense" may reek with evidence proving insanity; nevertheless the jury could not consider it and would be so instructed. The necessary ingredient of a "sound mind and discretion" required by the Code itself must be presumed to exist because sanity is conclusively presumed.

The jury may "guess" or "flip a coin" or arbitrarily decide that life or death be imposed but they may not have any evidence other than the gruesome details on which to exercise their discretion. The very atrocity of the crime might tend to prove the insanity of the perpetrator but, under this horrible law, instead of it being a mitigation the jury would be compelled to use it as an argument against mercy.

Under Section 190 of the Penal Code the jury has a right to exercise its discretion in fixing the punishment for first degree murder at death or life imprisonment.

Under Section 189 the jury has the right to fix the degree of murder at Second Degree, provided it has not been committed in the perpetration of one of the felonies therein enumerated.

Section 1105 gives the accused the right to prove any mitigating circumstances, to-wit: Lack of malice express or implied (an abandoned and malignant heart); lack of intent by reason of the circumstances connected with the offense and/or a lack of sound mind and discretion.

These are substantive rights and (irrespective of the questionable right of a Legislature to take them away if it so desires) depriving an accused of these rights must be done by substantive law not a statute merely changing the established procedure.

It may be that the soundness of mind and lack of discretion in the accused are not of sufficient degree to excuse him of complete responsibility for his crime; it may be that he was actuated by a humane, lofty, self-sacrificing motive which, while erroneous in morals, mistaken in law and completely insufficient as a defense, nevertheless would be thoroughly ample to destroy the idea of an "abandoned and malignant heart" and would give the jury SOME basis on which to exercise its discretion. Yet under the sections in question the accused would be precluded from showing all this, which the law gives him the undoubted right to do.

This Supreme Court in *Davis* v. *United States,* 160 U. S. 469 at 484, 40 L. Ed. 489 at 504 states the principle contended for as follows:

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every ELEMENT necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether upon all the evidence, BY WHATEVER SIDE ADDUCED, guilty is established beyond reasonable doubt. IF THE WHOLE EVIDENCE, INCLUDING THAT SUPPLIED BY THE PRESUMPTION OF SANITY, DOES NOT INCLUDE BEYOND REASONABLE DOUBT THE HYPOTHESIS OF INSANITY, OF WHICH SOME PROOF IS ADDUCED,

THE ACCUSED IS ENTITLED TO AN ACQUITTAL OF THE SPECIFIC OFFENSE CHARGED."

(Note: Most important, because under the bifurcated plea this is wholly denied.)

"His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" (pp. 504-505-506)

* * * * * * *

"The principle is accurately stated by Mr. Justice Cox of the Supreme Court of the District of Columbia, as follows: 'The crime, then, involves three elements, viz., THE KILLING, MALICE, AND A RESPONSIBLE MIND in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned,—i. e., that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears,—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, *on any ground* (either as to the KILLING or the RESPONSIBLE CONDITION OF MIND), whether he is guilty of the crime of murder, as it has been explained and

defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal.' " Guiteau's Case, 10 Fed. Rep. 161, 163.

Davis v. *United States*, 160 U. S. 469, at 484, 40 L. Ed. 499, at 504.

Malice, as before pointed out, is also an essential ingredient.

It may be express or implied.

If implied by reason of an "abandoned and malignant heart" it is implied by reason of a MENTAL condition, as an "abandoned and malignant heart" can mean nothing more than a vicious and wicked mind.

If the possession of a sound mind and discretion, or sufficient of either, to enable an accused to have the necessary criminal intent (or in the case of first degree murder to form a basis for the jury to exercise its discretion in the matter of fixing the punishment), be an essential ingredient of the crime, and a fact to be proven like any other fact, to conclusively presume it would be the same as conclusively presuming guilt. Or, to put it this way: If a malicious intent be a necessary ingredient (a fact); and if it be necessary to have a sound mind and discretion in order to have an intent, it is not permitted by law to conclusively presume one in order to prove the other.

The presumption of innocence is an inherent—a constitutional right—and may not be overthrown by any statutory enactment.

If we permit the rebuttable presumption of sanity as establishing criminal responsibility ONLY to be a conclusive presumption that will in turn create a conclusive presumption that the accused is of sound mind AND not at all AFFECTED with insanity and therefore capable of forming the intent; of deliberating; of premeditating and correctly using his discretion then the presumption of innocence has been obliterated and destroyed.

Reasons for Granting the Petition.

The doctrine, whereby was affirmed the constitutional validity of the double plea of "Not Guilty" and "Not Guilty by reason of Insanity" according to which the accused, on the "not guilty" plea is conclusively presumed to have the mental attributes that are the essential ingredients of the crime, was enunciated by the Supreme Court of California in the cases of *Peo.* v. *Troche,* 206 Cal. 35 and *Peo.* v. *Leong Fook,* 206 Cal. 64. A strong and well reasoned dissenting opinion was filed by the Hon. Associate Justice John W. Preston, in both cases. Many able lawyers are in agreement with the reasoning of Justice Preston. The decision of the court is contrary to the reasoning of many other State courts particularly to the decision of *State* v. *Strasburg,* 60 Wash. 106, 119 Ann. Cas. 1912B 917, 32 L. R. A. (N. S.) 1216, 110 Pac. 1020 and is directly in conflict with the reasoning of this Supreme Court in the case of *Davis* v. *United States,* 160 U. S. 469, 40 L. Ed. 499.

We therefore have directly conflicting opinions between State courts and between a State court and this Supreme Court bearing directly on the inherent right, protected by the Constitution, to a trial by due process of law. The decision therefore decides a Federal question and we believe it to be in conflict with the applicable decisions of this Court.

The California Supreme Court has decided an important question of general law in a way deemed untenable and in conflict with the weight of authority, and contrary to the case of *Davis* v. *The United States* (*supra*).

The question as to constitutionality of the sections of the Penal Code in question has not been passed on by this Court.

Cases Believed to Sustain Jurisdiction.

Ex Parte Snow, 120 U. S. 273, 30 L. Ed. 658;
Ex Parte Kemmler, 136 U. S. 436, 34 L. Ed. 519;

Peo. v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184, 62 A. L. R. 785;
Dreyer v. *Pease,* 88 F. 978;
Mooney v. *Holohan,* 294 U. S. 103, 79 L. Ed. 791;
Robb v. *Connolly,* 111 U. S. 624, 28 L. Ed. 542.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Jan. 31, 1928 and April 26, 1928.

Respectfully submitted,

THOS. D. AITKEN,
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APPENDIX "A".

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

Monday, August 15th, 1932.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE DOUGLAS TEMPLETON, JR., Defendant.

Arraignment of Defendant.

THE COURT: People against Templeton. This is the time for receipt of plea.

MR. AITKEN: The defendant pleads he is not guilty of the offense charged. I would like to state at this time, that inasmuch as a large part of one of the defenses of this accused is insanity, I would like to ask the Court for a ruling at this time whether evidence of insanity will be permitted under the plea.

I am asking it at this time rather than later, at the trial of the case, as was done in the Pantages case, when the objection was made on *voir dire;* I think it is better procedure,—it is a matter of procedure entirely within the discretion of the Court. I think it will clear up things, hasten matters generally, if the Court would make a ruling at this time.

I want to state that I am not unmindful of the decisions of our Supreme Court in the cases of People against Troche, 206 California, 35; People against Fook, 206 California, 65; and People against Hickman, 204 California, 470,—all of which cases, except the Hickman case, Justice Preston dissenting,—the decision also in People against Davis, 94 California Appeals, 192,—I think the dissenting opinion in those cases to be the correct one; and it is possible, if the question were presented differently to the Court, it might hold differently.

As a matter of fact, those cases turned more on the question of procedure rather than the substantial rights of the

defendant. We are approaching the question from an entirely different standpoint, which I would like to briefly explain to the Court, in order that your Honor can know what the question is, so as to determine whether to act upon it now, or later.

Without going into extended argument now, briefly the point that I desire to preserve in the record is this:

Wilful and deliberate intent is an essential in the crime of murder in the first degree. There can be no intent where there is no sane mind capable of forming one. It cannot be wilful where there is no will. If there is a reasonable doubt that the accused had such an intent, he must be acquitted according to the law of the land.

The right to acquittal, when a reasonable doubt exists, is the law of the land,—it has become by usage an absolute right. It is now an absolute right. A conviction, notwithstanding a reasonable doubt, is without due process of law.

The California law, in its present form, deprives this defendant of the benefit of any reasonable doubt as to his sanity, arising on the facts, and deprives him of the right to have the prosecution prove beyond a reasonable doubt, the premeditation and deliberate and wilful intent which must be proved under the charge here, and requires him to prove his insanity by a preponderance of the evidence; also, it deprives him of the right to have the jury consider his insanity or mental weakness as a mitigating circumstance in fixing the penalty; also, it deprives him of his right to have the question of his sanity and of his liability to punishment tried by an impartial jury.

I will be glad to brief the question, if the Court cares to grant the necessary time. It is a very important point. I think it has not been touched,—the cases mentioned, they are the only cases, I believe, that have been decided by the Supreme Court——

THE COURT: Were not all those cases mentioned decided after the amendment?

MR. AITKEN: They were all decided after the amendment.

THE COURT: 1927.

MR. AITKEN: Yes, decided after the amendment. Only turning on the question of right to one trial, and they de-

cided that it is one trial, although two different juries may be used. They never touched the point as to whether the accused has been deprived of his opportunity to present insanity under the first plea. Thereby raising the right to get the benefits of it.

THE COURT: The question of raising the defense of insanity under the plea of not guilty; that is the opportunity you mean?

MR. AITKEN: Yes, sir.

THE COURT: You propose to make only one plea?

MR. AITKEN: Unless we are compelled to do otherwise. I want to go further: we object to the procedure imposed on the accused under Sections 1016, 1020, 1026 and 1026-a of the Penal Code, as in violation of Section 7,—which confers a right to a trial by an impartial jury,—and Section 13,—the due process of law clause,—of Article 1 of the State Constitution, and also as a violation of the sixth and fourteenth amendments of the Federal Constitution.

That states briefly what our objection is. I think your Honor has an open mind on the question. There are all these decisions which really did not touch it, and if we were allowed an opportunity to present it in detail, we might convince your Honor of the correctness of our position.

THE COURT: Of course the Court could not at this time pass on the question of evidence, because every case will have to stand on its own ground in that regard; what might be competent one time might not be at another. We could not pass on what evidence would be admitted as to insanity at this time.

The Code is very specific as to procedure.

There are five kinds of pleas to an indictment or information:

"1. Guilty.
2. Not Guilty.
3. A former judgment of conviction or acquittal, of the offense charged.
4. Once in jeopardy.
5. Not guilty by reason of insanity."

"A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead

ıot guilty by reason of insanity' shall be conclusively pre-
ımed to have been sane at the time of the commission of the
ffense charged, provided that the Court may, for good
ıuse shown, allow a change of plea at any time before the
ɔmmencement of the trial. Defendant who pleads 'not
ıilty by reason of insanity', without also pleading not
ıilty, thereby admits the commission of the offense
ıarged."

The Section seems very plain to the Court. Do you wish
be heard in this matter?

MR. FITZGERALD: This is not the time for the matter;
ıis is the time for plea, the pleas set forth in the Code.

THE COURT: I will have to follow the Code, as long as
ıe Code stands, as long as this Section has not been
:tacked.

MR. AITKEN: The only reason I advanced it at this
me, the cases mentioned state that the Court has a very
ide latitude, discretion in the matter of procedure to be
llowed in the matter of those pleas. I thought that wait-
g until the jury is impaneled, and then making the objec-
on on *voir dire* by asking the question of a juror whether
not he would permit or would consider insanity as a miti-
ıting matter, or any defense and so on, at which time the
rosecuting Attorney would object, and then the record is
ade to preserve the question for the Appellate Court, it
ɔpears to me as rather an awkward sort of procedure be-
ıuse, if the District Attorney did not object, and the juror
ere allowed to answer the question, it would make no dif-
rence, really, because later on introducing evidence of that
nd might be blocked just the same. It is immaterial as to
hether it would be a better time now than later, as long as
e can get it in the record at some time, inasmuch as we are
troducing the point, I believe, for the first time, the way
e are, it would be a more logical matter to call it up in ad-
ıce of the trial, because we might avoid the difficulty and
pense of getting the jury together.

THE COURT: The Court will follow the procedure as
id down in the Code; it is very plain; it says: "a defend-
t who does not plead 'not guilty by reason of insanity'
all be conclusively presumed to have been sane". In the

face of that plain provision of the Code, the Court would not want to change the procedure as set out here.

MR. AITKEN: I want to ask that the record show that by our next plea, there is no waiver of rights on the part of the defendant that attach to his former plea. I understand that it is required that the accused do his own pleading,—inasmuch as he is not familiar with the language of the Code,—that is what I thought. We plead "not guilty" to the offense.

THE COURT: That is one plea, Not Guilty.

Templeton, will you stand, please. You are about to make your plea now, to the offense charged in the information, filed by the District Attorney on the 8th day of August, 1932, which charges you with a felony, to wit: murder, alleged to have been committed on or about the 26th day of July, 1932, in the County of Santa Clara, State of California, it being alleged that the defendant did wilfully, unlawfully, feloniously and with premeditation and malice aforethought, kill and murder one Lillian Babcock, a human being.

You are now to plead to the offense charged in this information. What do you plead? Your Counsel has stated one plea, but the law requires that you state it personally.

THE DEFENDANT: I plead not guilty.

THE COURT: Not guilty. Mr. Clerk, enter the plea already made, of not guilty.

CLERK NEWLIN: Yes, sir.

THE COURT: Mr. Aitken, you have another plea?

MR. AITKEN: Not guilty of the offense charged because he was insane at the time he is alleged to have committed the unlawful act.

THE COURT: Not guilty by reason of insanity.

MR. AITKEN: That is the short plea. I think I followed the statute.

THE COURT: Not guilty by reason of insanity. Have you another plea, other than you have already made?

THE DEFENDANT: Not guilty by reason of insanity.

THE COURT: Enter that plea, also, Mr. Clerk.

CLERK NEWLIN: Yes, sir.

* * * * * * *

MR. AITKEN: Under Section 1027 of the Code, we ask the appointment of alienists as provided in that section.

THE COURT: The Court will consider that. The Court will appoint alienists in conformity with that section. I will take that under consideration, Mr. Aitken.

* * * * * * *

MR. FITZGERALD: Will your Honor now make an order fixing the time for trial? (Discussion of dates and condition of the calendar).

THE COURT: If the case is set more than thirty days ahead, that will have to be waived.

MR. AITKEN: We will specifically waive any constitutional claims if the trial is longer than thirty days ahead.

THE COURT: Templeton, will you stand again?

On the request of your attorney, the time of your trial, instead of being within thirty days, which is the legal time, will have to go, to complete your defense as stated by your Counsel, beyond that period.

Do you waive the constitutional and statutory time in which you should be tried?

THE DEFENDANT: I waive that right, your Honor.

THE COURT: You do that personally. Let the record show. What is the date, Mr. Clerk?

CLERK NEWLIN: Monday, September the 19th.

THE COURT: Monday, September 19th, 1932, at ten o'clock a. m. is set as the time for trial.